In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-880

HALTER MARINE FABRICATORS, INC. and FIDELITY & CASUALTY OF NEW YORK

Petitioners

versus

JOHN L. NULTY and DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Longshoremen's and Harbor Workers' Compensation Act, as amended 1972

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Petitioners, Halter Marine Fabricators, Inc. and Fidelity & Casualty of New York, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on September 27, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, p. A 1, and the Judgment appears at Appendix B, p. A 18. The decision of the U.S. Department of Labor, Benefits Review Board, an unreported decision rendered on May 2, 1975, appears at Appendix C, p. A 20.

The decision of the U.S. Department of Labor, Office

of Administrative Law Judges, rendered on August 23, 1974, an unreported decision, appears at Appendix D, p. A 31. The supplemental decision and order of the U.S. Department of Labor, Office of Administrative Law Judges, which is not relevant to this petition, was rendered on August 8, 1975 and appears at Appendix E, p. A 45.

JURISDICTION

The opinion and judgment of the U.S. Court of Appeals for the Fifth Circuit were entered on September 27, 1976. See Appendix A, p. A 1. This petition for certiorari was filed less than ninety days from the aforesaid date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. What employees of a Shipbuilder should be considered "engaged in maritime employment" as that clause is used in the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act?

2. Did Congress, by the 1972 Amendments to the Longshoremen's Act, intend to expand coverage of the Act to the shipbuilder employees assigned permanently to land, and whose regular duties do not involve a realistically significant relationship to traditional maritime activity?

3. Was shipbuilder employee John Nulty engaged in "maritime employment" for purposes of coverage under the Longshoremen's Act when, as a carpenter assigned permanently to a carpentry shop on land, he was fabricating a wooden block for an uncompleted hull afloat upon navigable waters, and when finished the

wooden block would have been installed upon the hull by someone other than Nulty?

4. Whether the admiralty and maritime jurisdiction may be constitutionally expanded by Congress to include injuries occurring on land to persons engaged in new ship construction?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Article III, Sec. 2:

> ". . .the judicial Power shall extend. . .to all Cases of admiralty and maritime Jurisdiction. . ."

Longshoremen's and Harbor Workers' Compensation Act, as amended 1972, 33 U.S.C. § 902(3):

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker. . ."

Longshoremen's and Harbor Workers' Compensation Act, as amended 1972, 33 U.S.C §902(4):

> "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading,

> repairing, or building a vessel.)"

Longshoremen's and Harbor Workers' Compensation Act, as amended 1972, 33 U.S.C. §903(a):

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading repairing, or building a vessel.)"

STATEMENT OF THE CASE

Petitioner, Halter Marine Fabricators, Inc., is engaged in the business of shipbuilding, and the respondent, John Nulty, was employed as a carpenter in the petitioner's Moss Point, Mississippi shipyard. Petitioner Fidelity and Casualty of New York is the compensation insurer of Halter Marine Fabricators, Inc.

The material facts of the case are not in dispute. On July 30, 1973, John Nulty was using a table saw in the Halter Marine carpentry shop when the blade caught the wood, and pulled his left hand through the saw. As a result of this accident Nulty sustained traumatic amputation of the left fourth (little) finger and a portion of the left thumb.

Nulty received workmen's compensation benefits under the provisions of Mississippi's compensation statute, entering into a Final Settlement approved by the Mississippi

Workmen's Compensation Commission. (See Appendix D at p. A 31). He also applied for compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., and an award of benefits under that act was ultimately affirmed by the Fifth Circuit Court of Appeals, (see Appendix A at p. A 1).

At the hearing before the Administrative Law Judge,it was stipulated that the accident occurred as above described and, further, that the block of wood on which Nulty was working was to hold a spare wheel on an offshore supply vessel which was uncompleted but launched and in the navigable waterways of the United States, approximately 100 yards from the carpentry shop where Nulty was working. It was also stipulated that Mr. Nulty was disabled for the period July 31, 1973 to September 9, 1973 and that he returned to work on September 10, 1973 with no further loss of wages.

Testimony before the Administrative Law Judge established the following uncontradicted facts: petitioner, Halter Marine Fabricators, Inc., is engaged only in new ship construction; Mr. Nulty had been assigned to work in the carpentry shop full time, and it was only on rare occasions when he would board a hull which had been launched; in this case after the piece had been fabricated, a shipfitter, not Mr. Nulty, would have transported it to and installed it upon the hull.

The Administrative Law Judge found that Nulty was a "shipbuilder" and therefore an "employee" engaged in "maritime employment" within the meaning of the Longshoremen's Act; and he held that Nulty was entitled to benefits under the Act. The Administrative Law Judge held that he did not have authority to rule on whether the 1972 Amendments to the Longshoremen's Act were unconstitu-

tional in extending coverage to shipbuilder employees who sustain injuries on land.

The Benefits Review Board of the U.S. Department of Labor affirmed the decision of the Administrative Law Judge (see Appendix B, at p. A 18), declining to decide the constitutional issue presented. On Appeal to the Fifth Circuit Court of Appeals this case was consolidated with the case of *Jacksonville Shipyards, Inc. v. Perdue,* Civil Action No. 75-1659, and three other cases, all of which involve important interpretations of the 1972 Amendments to the Longshoremen's and Harbor Workers' Act. The Fifth Circuit had jurisdiction by virtue of 33 U.S.C. § 921(c), and it affirmed the Board's findings of coverage on the basis that Mr. Nulty was a covered employee, engaged in "maritime employment" at the time of his accident. It held that Mr. Nulty was engaged in "maritime employment" because he was directly engaged in "shipbuilding".

The Fifth Circuit recognized that its interpretation of the 1972 Amendments meant that Congress had considerably broadened the sphere of admiralty and maritime jurisdiction. Nevertheless, the two-judge panel[1] held that the Amendments to the Longshoremen's Act were constitutional because Congress had "broad power to expand the reach of admiralty jurisdiction." (Appendix A, at p. A 1).

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1. See Appendix A, at p. A 1, where, in an asterisked footnote, it is explained that one Judge did not participate in the decision because of illness, and the case was decided by the remaining two judges pursuant to 28 U.S.C. § 46 (d).

REASONS FOR ALLOWING THE WRIT

1. THE DECISION OF THE FIFTH CIRCUIT IN THE INSTANT CASE IS IN CONFLICT WITH THE DECISION OF THE FOURTH CIRCUIT IN *I.T.O. CORP. OF BALTIMORE V. ADKINS*, 529 F.2d 1080 (4th Cir. 1975)

The Fourth Circuit held in *Adkins* that employees of a stevedore who bring cargo to its last point of rest before being physically loaded on a ship are not "longshoremen" and are not "engaged in maritime employment" within the meaning of the 1972 Amendments to the Longshoremen's Act. While Adkins was a longshoremen-type employee and respondent Nulty was an employee of a ship-builder, there are substantial similarities in the cases. In fact, the Fifth Circuit consolidated on appeal with Nulty two shipbuilder cases and two longshoremen cases. (See Appendix A at p. A 1).

Nulty, like Adkins, would have brought the item on which he was working to a last point of rest before it would have been transported to and installed upon the hull by someone else, a shipfitter. *Adkins* and this case involve the interpretation of the clause "engaged in maritime employment". While there are differences between the cases, both involve the question of whether the employee must himself be personally involved in the process of handling an item as it is transported to or from the vessel on navigable waters. The *Adkins* Court held that such involvement was necessary in order to be a covered employee, while the Fifth Circuit held the opposite.

It is submitted that the conflicting decisions in the two

circuits affect the coverage of the federal compensation scheme for many longshoremen and shipyard workers. It is respectfully submitted that review by this Court is required to bring uniformity to this important area.

2. THE DECISION BELOW IS ANALAGOUS TO THE DECISIONS IN TWO CASES WHICH THIS COURT HAS RECENTLY AGREED TO REVIEW.

This Court has recently issued writs of certiorari in *Northeast Marine Terminal Co., Inc. v. Caputo*, No. 76-444, October Term 1976, and in *International Terminal Operating Co., Inc. v. Blundo*, No. 76-454, October Term 1976. These cases involve the interpretation of the 1972 Amendments to the Longshoremen's Act, and particularly the definitions of the terms "employee", "maritime employment", and "longshoreman". The opinion of the Second Circuit Court of Appeals in *Caputo* and *Blundo* conflicts with the decision of the Fourth Circuit in *I.T.O. Corp. of Baltimore v. Adkins, supra*, 529 F.2d 1080 (4th Cir. 1975), but it is in agreement with the decision reached by the Fifth Circuit in two companion cases to the case *sub judice*. See *P.C. Pfeiffer Co. v. Ford* and *Ayers S.S. Co. v. Bryant*, decided by the Fifth Circuit in the same opinion which rendered the decision in this case (Appendix A at p. A 1), and in which a petition for writ of certiorari was filed with this Court on November 8, 1976, No. 76-641, October Term 1976.

This Court's decision in *Caputo* and *Blundo* could be dispositive of the issues in this case, depending upon the actual decision and the reasons therefor. If this Court reverses the Court of Appeals' holding in *Caputo* and *Blundo* on the grounds that a person will not be a covered employee engaged in maritime employment within the meaning of the 1972

Amendments to the Longshoremen's Act unless his regular duties include traditional maritime activities, then the issues involved in this case should be resolved. If however, this Court affirms the decision of the Fourth Circuit or reverses on some grounds other than those stated above, then serious issues will need to be resolved in this case, including one of constitutional interpretation.

Interpretation of "employee" and "maritime employment" should be consistent in both the context of longshoring and shipbuilding. It is respectfully submitted that review of the lower Court's decision in this case consolidated with a review of *Caputo* and *Blundo* would be of assistance to the Court in arriving at a consistent interpretation. Further, the interpretation of terms in the shipbuilding context involve constitutional issues which will not be raised or considered if the longshoring cases are reviewed by themselves.

3. THE COURT OF APPEALS' BROAD INTERPRETATION OF THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S ACT IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT ESTABLISHING ADMIRALTY JURISDICTION.

The 1972 Amendments to the Longshoremen's Act made substantial changes in the criteria for compensation benefits. Injuries occurring on land became compensable, and for the first time there was a requirement that a person be an employee, as that term is defined in the Act, in order to be eligible for benefits. Essentially this case presented the Court of Appeals with issues of statutory construction, but the court interpreted the Amendments so broadly that it violated established principles of admiralty jurisdiction.

While the Act defines "employee" as "any person engaged in maritime employment, including ... shipbuilder...", 33 U.S.C. § 902(3), unfortunately Congress did not define either the term "maritime employment" or "shipbuilder". See, *Pittston Stevedore Corp. v. Dellaventura,* No. 76-4042 (2d Cir. July 1, 1976), cert. granted, *sub nom, Northeast Marine Terminal Co., Inc. v. Caputo,* No. 76-444, October Term 1976 and *International Terminal Operating Co., Inc. v. Blundo,* No. 76-454, October Term 1976.

Obviously Congress did not intend for all employees of shipbuilders to be covered by the Act. Had it so intended it could have defined the term "employee" as anyone employed by a defined employer. Instead Congress defined the term with the specific requirement that a person be engaged in maritime employment. Put in another way, a person is not engaged in maritime employment solely by virtue of the fact that he is employed by a shipbuilder. The applicable provisions of the 1972 Amendments could have been interpreted in a manner consistent with established admiralty jurisdiction, as was done by the Ninth Circuit in its holding that a person is engaged in maritime employment when his own work has a "realistically significant relationship to 'traditional maritime activity ...' ". *Weyerhaeuser v. Gilmore,* 528 F. 2d 957, 961 (9th Cir. 1975).

The 1972 Amendments to the Longshoremen's Act were enacted pursuant to Congress' power to legislate in the realm of admiralty and maritime jurisdiction. *Pittston Stevedore Corp. v. Dellaventura, supra,* No. 76-4042 (2d Cir. July 1, 1976); *Sea-Land Service, Inc. v. Johns, supra,* 540 F.2d 629, 635 (3d Cir. 1976); *Weyerhaeuser Co. v. Gilmore, supra,* 528 F. 2d 957, 961 (9th Cir. 1975). Thus the term "maritime employment" can have no meaning broader than the

admiralty and maritime jurisdiction granted by the Constitution. *Constitution of the United States*, Art. III, sec. 2.

Historically–and without exception–there have been but two bases for admiralty jurisdiction: tort and contract. A tort is within the maritime sphere when it occurs on navigable waters and the activity bears a significant relationship to traditional maritime activity. *See, e.g., Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493 (1972); *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 42 S.Ct. 157 (1922). As Mr. Nulty's accident occurred on land, it cannot be seriously contended that it was within the admiralty jurisdiction on a tort basis.

Whether a contract is within the admiralty jurisdiction depends on the nature of the transaction. *Grant Smith-Porter Ship Co. v. Rohde, supra*, 257 U.S. 469, 42 S.Ct. 157 (1922). It has been repeatedly held that a contract to build a ship is not a maritime contract. *See, e.g., Thames Towboat Co. v. The Francis McDonald*, 254 U.S. 242, 41 S.Ct. 65 (1920); *North Pacific S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 39 S.Ct. 221 (1919).

Despite these well-established admiralty principles, and without any basis for holding that Congress intended to overrule them, the Court of Appeals defined the term "maritime employment" without reference to traditional maritime activity. That the lower court recognized the conflict between its opinion and the cases of this Court defining admiralty jurisdiction is implicit in the lower court's holding that Congress has broad discretionary power to expand admiralty jurisdiction.

It is respectfully submitted that the opinion of the Court of Appeals should be reviewed to determine whether Con-

gress intended that the term "maritime employment" have a meaning directly in conflict with prior decisions of this Court. Review by this Court would appear to be required in this case since the term can be reasonably interpreted in a manner consistent with prior decisions of this Court.

4. APPLICABLE PROVISIONS OF THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S ACT ARE AN UNCONSTITUTIONAL ATTEMPT TO EXPAND ADMIRALTY JURISDICTION.

As interpreted by the Court of Appeals, these portions of the Amendments which seek to expand the admiralty jurisdiction to cover injuries occurring on land, solely on the basis of employment by a shipbuilder in an area adjoining navigable waers, is unconstitutional.

In *The Genesee Chief*, 53 U.S. (12 How.) 443, 13 L.Ed. 1058 (1851), it was held that the parameters of admiralty and maritime jurisdiction were fixed at the time of adoption of the Constitution. What was considered as within the admiralty jurisdiction at that time formed the outer limit to which Congress can expand that jurisdiction. The principle was stated by Chief Justice Taney:

> "If this law, therefore, is constitutional, it must be supported on the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States when the Constitution was adopted."

The *Genesee Chief, supra*, 53 U.S. (12 How.) 443, 454 (1851). See also *The People's Ferry Co. of Boston v. Beers*,

61 U.S. (20 How.) 393, 400, 15 L.Ed. 916, 964, (1857), where the Court restated the principle of *The Genesee Chief* and held that what was not considered within the admiralty jurisdiction when the Constitution was framed was left to the regulation of the states and that right could not be infringed by either the legislative or the judiciary department of the federal government.

At the time the Constitution was adopted, no one would have contended that an employee injured on land and employed to fulfill a non-maritime contract was within the admiralty jurisdiction. If "maritime employment" in the Longshoremen's Act, as amended, has the broad meaning found by the lower court, it must be because the admiralty jurisdiction has been expanded beyond the limits that contained it at the time our Constitution was adopted. If the principles of admiralty jurisdiction annunciated in *The Genesee Chief* and *The People's Ferry* are still viable, and they have never been expressly overruled, then the Longshoremen's Act, insofar as it purports to expand admiralty jurisdiction, is unconstitutional.

Even if admiralty jurisdiction may be expanded by Congress, depending upon changed "conceptions of maritime concerns", as was indicated in dicta in *Detroit Trust Co. v. The Thomas Barlum,* 293 U.S. 21, 52, 55 S. Ct. 31, 41 (1934), the result must be the same. Modern conceptions of maritime concerns, it is respectfully suggested, cannot bring an employee within the admiralty jurisdiction when the sole basis for attempting to do so is the fact that he works on land adjacent to water for a company that builds boats. As long as a contract to build a ship is considered outside the admiralty jurisdiction, an employee who participates in the building of that ship and who sustains injury on land cannot be brought within the realm of admiralty jurisdiction by act

of Congress or by judicial fiat.

As was said concerning admiralty jurisdiction in *The St. Lawrence,* 66 U.S. (1 Black) 522, 527, 17 L. Ed. 180, 183 (1862), "no state law can enlarge it, nor can an Act of Congress or rule of court make it broader than the judicial power may determine to be its true limits."

Review by this Court of decisions interpreting Congressional Acts which purportedly affect admiralty jurisdiction would appear to be required, it is respectfully suggested, whenever that jurisdiction is, as here, significantly expanded beyond traditional bounds. In this case the Administrative Law Judge and then the Benefits Review Board refused to consider the constitutional aspects of expansion of admiralty jurisdiction. Since appeal from the administrative level is directly to the circuit court, 33 U.S.C. § 921(c), only one panel passed upon this important issue. In view of these factors, review by this Court is particularly warranted to correct or clarify the differences between the lower court's opinion and this Court's decisions in *The Genesee Chief* and *The People's Ferry.*

No effort has yet been made to evaluate the effect of a partial intrusion of the admiralty and maritime jurisdiction to a non-maritime activity. Neither Congress, in adopting the Amendments, nor the Court below in interpreting them, considered the potential ramifications. What, for example, is the status of a contract to build a vessel if some workers engaged in the performance of the contract are now maritime workers? What also is the status of state compensation statutes which have for years afforded benefits for these shipyard workers? Are shipyard workers to be held to the federal remedy or has Congress, in its haste, created a new "twilight zone" of unmeasurable dimensions? Does a ship-

yard worker injured on land by the negligence of a third party have an action now in admiralty for those injuries?

These and other questions should be considered by this Court. This case presents that opportunity.

CONCLUSIONS

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted and that the arguments in this case and in Nos. 76-444 and 76-454 should be set consecutively or consolidated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles E. Lugenbuhl, one of attorneys for petitioners in the above-entitled proceeding, being a member of the Supreme Court of the United States, do hereby certify that on the 22nd day of December, 1976, I served copies of the Petition for Writ of Certiorari, together with the Appendix attached thereto, by mailing copies thereof in duly addressed envelopes by air mail postage pre-paid to John L. Nulty, *Pro Se*, Post Office Box 805, Escatawpa, Mississippi 39552, to William J. Kilberg, Solicitor, and Linda L. Carroll, Attorney, United States Department of Labor, Suite N-2716, New DOL Building, Washington, D.C. 20210, and to Solicitor General, Department of Justice, Washington, D.C. 20530.

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CORRECTED A-1 APPENDIX A

JACKSONVILLE SHIPYARDS, INC., and Aetna Casualty & Surety Company, Petitioners,

v.

Herbert L. PERDUE and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

JACKSONVILLE SHIPYARDS, INC., and Aetna Casualty & Surety Company, Petitioners,

v.

Charles W. SKIPPER and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

P. C. PFEIFFER COMPANY and Texas Employers' Insurance Association, Petitioners,

v.

Diverson FORD and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

HALTER MARINE FABRICATORS, INC., and Fidelity & Casualty of New York, Petitioners,

v.

John L. NULTY and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

AYERS STEAMSHIP COMPANY and Texas Employers' Insurance Association, Petitioners,

v.

Will BRYANT and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

Nos. 75-1659, 75-2833, 75-2289, 75-2317 and 75-4112.

United States Court of Appeals, Fifth Circuit.

Sept. 27, 1976.

Proceeding was brought to review awards to five shoreside workers, who were injured in course of their employment, under 1972 Amendments to Longshoremen's and Harbor Workers' Compensation Act by Benefits Review Board. The Court of Appeals, Tjoflat, Circuit Judge, held that Board properly awarded benefits to two workers who were handling maritime cargo on shore as well as to a carpenter who was fabricating parts for a new ship, but that Board misconstrued Act in extending coverage to shipboard worker who stumbled in front of his employer's office a mile from ship and to employee who was helping to tear down shed in disused marine repair facility; and that Congress, which could reasonably have felt that shipbuilding employees beside navigable waters were performing sufficiently maritime function to be covered by harbor workers' compensation statute, did not exceed its broad discretion by extending coverage to such work.

Affirmed in part and reversed in part.

1. Workmen's Compensation ⇐262

In 1972 Amendments to Longshoremen's and Harbor Workers' Compensation Act Congress replaced old "water's edge" analysis with two-part test which requires that claimant have been engaged in "maritime employment" and that injury have taken place upon situs specified in the Act. Longshoremen's and Harbor Workers' Compensation Act, §§ 2(3), 3(a) as amended 33 U.S.C.A. §§ 902(3), 903(a).

2. Workmen's Compensation ⇐262

Employee's general job classification such as "longshoreman" or "ship repairman" will not bring employee within coverage of 1972 amendments to Longshoremen's and Harbor Workers' Compensation Act regardless of nature of work which he was performing when he was injured, nor is official name of employee's union or language of union's jurisdictional agreement dispositive of issue of coverage under the Act; rather, it is employee's work at time of injury which controls. Longshoremen's and Harbor Workers' Compensation Act, § 2(3) as amended 33 U.S.C.A. § 902(3).

3. Workmen's Compensation ⇐262

Injured worker is covered "employee" under 1972 amendments to Longshoremen's and Harbor Workers' Compensation Act if at time of his injury he was performing work of loading, unloading, repairing, building or breaking a vessel, or, although not actually carrying out such specified functions, he was directly involved in such work. Longshoremen's and Harbor Workers' Compensation Act, § 2(3) as amended 33 U.S.C.A. § 902(3).

4. Workmen's Compensation ⇐262

Coverage under Longshoremen's and Harbor Workers' Compensation Act does not depend on whether cargo has reached its shoreside "point of rest." Longshoremen's and Harbor Workers' Compensation Act, §§ 2(3), 3(a) as amended 33 U.S.C.A. §§ 902(3), 903(a).

5. Workmen's Compensation ⇐262

Principle that Longshoremen's and Harbor Workers' Compensation Act is to be liberally construed in favor of injured employee requires that doubts be resolved as to coverage afforded by 1972 amendments to Act in favor of particular groups of workers such as cargo handlers landward of "point of rest." Longshoremen's and Harbor Workers' Compensation Act, § 2(3) as amended 33 U.S.C.A. § 902(3).

6. Workmen's Compensation ⇐262

In determining whether area falls within situs provision of 1972 amendments to Longshoremen's and Harbor Workers' Compensation Act, Court of Appeals will look past area's formal nomenclature and examine facts to see if situs is one "customarily used by an employer in loading, unloading, repairing or building a vessel"; putative situs must actually be used for loading, unloading, or other function specified in the Act as of time of injury. Longshoremen's and Harbor Workers' Compensation Act, § 3(a) as amended 33 U.S.C.A. § 903(a).

7. Workmen's Compensation ⇐52

Longshoremen's and Harbor Workers' Compensation Act is to be liberally construed in favor of injured workers. Longshoremen's and Harbor Workers' Compensation Act, § 1 et seq. as amended 33 U.S.C.A. § 901 et seq.

8. Workmen's Compensation ⇐1935

Court of Appeals is bound by statutory presumption that individual claim comes within coverage of Longshoremen's and Harbor Workers' Compensation Act. Longshoremen's and Harbor Workers' Compensation Act, § 20(a), 33 U.S.C.A. § 920(a).

9. Workmen's Compensation ⇐1939.4(4)

Court of Appeals will not set aside award made by Benefits Review Board

under Longshoremen's and Harbor Workers' Compensation Act so long as award is supported by substantial evidence on the record considered as a whole and there is reasonable legal basis for Board's conclusions. Longshoremen's and Harbor Workers' Compensation Act, § 1 et seq. as amended 33 U.S.C.A. § 901 et seq.

10. Workmen's Compensation ⇐262

Where employer's office, which was purely clerical and administrative post, did not adjoin water and had nothing to do with loading, unloading, building or repairing vessels, employee, who at end of working day took bus to office approximately one mile from aircraft carrier he was working on to "punch out" on time clock and who while alighting from bus near office stumbled and injured his left knee in fall on pavement, was not injured on situs covered under 1972 amendments to Longshoremen's and Harbor Workers' Compensation Act. Longshoremen's and Harbor Workers' Compensation Act, § 3(a) as amended 33 U.S.C.A. § 903(a).

11. Workmen's Compensation ⇐262

Employee, who was injured at disused marine facility where he was assisting in tearing down building which had formerly housed fabrication shop in order to salvage some steel for use in constructing plant, was not performing ship repair work at time of his injury nor carrying out any other type of work statutorily specified as "maritime employment" or work sufficiently similar to fall within Congress' intent despite not being named in 1972 amendments to Longshoremen's and Harbor Workers' Compensation Act, and thus was not performing work covered under the Act at time of injury. Longshoremen's and Harbor Workers' Compensation Act, § 2(3) as amended 33 U.S.C.A. § 902(3).

12. Workmen's Compensation ⇐262

Where marine facility's shops had been inactive for approximately a year when employee was injured while tearing down building which had formerly held fabrication shop, and no repair work or any other work specified by 1972 amendments to Longshoremen's and Harbor Workers' Compensation Act was being performed in buildings, former shops had lost their status as ship repair or shipbuilding facilities and thus employee was not injured on situs covered under the Act. Longshoremen's and Harbor Workers' Compensation Act, § 3(a) as amended 33 U.S.C.A. § 903(a).

13. Workmen's Compensation ⇐262

Where employee's work of fastening military vehicles, which had not been moved directly from ship to flatcars but instead were taken first to storage area, was last step in transferring cargo from sea to land transportation and work was integral part of process of moving maritime cargo from ship to land transportation, employee, who was injured while helping to secure vehicle to railway flatcar, was performing covered work under 1972 amendments to Longshoremen's and Harbor Workers' Compensation Act. Longshoremen's and Harbor Workers' Compensation Act, § 2(3) as amended 33 U.S.C.A. § 902(3).

14. Workmen's Compensation ⇐262

Employee, who at time of injury was building piece of woodwork that was to be installed in new ship which had been launched but not yet commissioned and which was berthed about 300 feet from fabrication shop where employee was working, was directly involved in ongoing shipbuilding operation and thus was entitled to compensation under 1972 amendments to Longshoremen's and Harbor Workers' Compensation Act. Longshoremen's and Harbor Workers' Compensation Act, § 2(3) as amended 33 U.S.C.A. § 902(3).

15. Workmen's Compensation ⇐262

Employee, who was injured while working as a "cotton header" in pier-side warehouse in which cotton was stored temporarily before being taken on board ship and from which cargo was usually taken directly to ship, was working on waterfront area customarily used by employer in loading a vessel and was directly involved in "longshoring operations" and thus was covered under 1972 amendments to Longshoremen's and Harbor Workers' Compensation Act. Longshoremen's and Harbor Workers' Compensation Act, §§ 2(3), 3(a) as amended 33 U.S.C.A. §§ 902(3), 903(a).

16. Workmen's Compensation ⇐262

In exercise of its discretion, Congress could properly determine that "new conception of maritime concerns" justified extension of compensation coverage under Longshoremen's and Harbor Workers' Compensation Act to workers in immediate waterfront area who participate in ongoing shipbuilding operation. Longshoremen's and Harbor Workers' Compensation Act, § 1 et seq. as amended 33 U.S.C.A. § 901 et seq.; U.S.C.A.Const. art. 3, § 2.

17. Workmen's Compensation ⇐262

Congress, which reasonably could have felt that shipbuilding employees beside navigable waters were performing sufficiently maritime function to be covered by revamped harbor workers' compensation statute, did not exceed its broad discretion by extending coverage to such work in 1972 amendments to Longshoremen's and Harbor Workers' Compensation Act. Longshoremen's and Harbor Workers' Compensation Act, § 2(3) as amended 33 U.S.C.A. § 902(3).

18. Workmen's Compensation ⇐1850

Where petitioners in proceeding to review awards to five shoreside workers under 1972 amendments to Longshoremen's and Harbor Workers' Compensation Act never moved to dismiss director of office of workers' compensation program as respondent, which would have been proper method to obtain director's dismissal as a party and addition as amicus curiae, and another panel of Court of Appeals had granted motions by director to be added as a party respondent, Court of Appeals would not consider merits of contention that director was not proper respondent. Fed.Rules App.Proc. rule 27, 28 U.S.C.A.

19. Constitutional Law ⇐253(1)

Government officials are required to minimize risks of error and unfairness in proceeding by which one is deprived of life, liberty or property. U.S.C.A.Const. Amend. 5.

20. Constitutional Law ⇐318(2)

Where Benefits Review Board awarded attorney fee to counsel for successful claimant under 1972 amendments to Longshoremen's and Harbor Workers' Compensation Act only for work performed before Board, which read counsel's briefs and observed his representation of claimant, fee which was granted was carefully limited to those services of which Board had first-hand knowledge and thus, in view of extremely generalized nature of attack upon fee's reasonableness, awarding fee without evidentiary hearing did not violate due process. Longshoremen's and Harbor Workers' Compensation Act, § 28(a, c) as amended 33 U.S.C.A. § 928(a, c); U.S.C.A.Const. Amend. 5.

Petitions for Review of Orders of the Benefits Review Board, United States Department of Labor.

Before TUTTLE, THORNBERRY and TJOFLAT, Circuit Judges.*

TJOFLAT, Circuit Judge.

I

AN OVERVIEW OF THESE CASES

The Parties and Their Dispute. With these five vigorously contested appeals, petitioners and respondents join battle for the third time. Each individually named respondent is a shoreside worker who was injured in the course of his employment. These respondents claim that their injuries are covered by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act (the Act), 33 U.S.C. §§ 901 *et seq.* (1970). In their fight for coverage, the workers have a new and virtually untested weapon, *viz.*, those portions of the 1972 Amendments which expanded the scope of the Act.[1] They also have a powerful and articulate ally in the other respondent, the Director of the Office of Workers' Compensation Programs of the United States Department of Labor (the Director).[2] The forces arrayed against respondents consist of the workers' employers and the employers' insurance carriers.

Procedural History. In each of the cases, a preliminary skirmish was fought before an Administrative Law Judge.[3] Reports from these battlefields show mixed results; petitioners won three of the engagements, and respondents two. The theater of operations then shifted to the Washington, D.C., headquarters of the Benefits Review Board of the Department of Labor (the Board).[4] The Board adopted an extremely liberal view of the Act's coverage, and respondents swept to victory in all five cases. After losing the fight in Washington, D.C., petitioners chose to escalate the conflict by asking this Court to review the Board's decisions.[5]

The Issues on Appeal. Before this Court, the lines of battle have been drawn with admirable clarity and good

* Judge Thornberry was a member of the panel that heard oral arguments but due to illness did not participate in this decision. 28 U.S.C. § 46(d) (1970).

1. Especially pertinent are new Sections 902(3) (definition of "employee"), 902(4) (definition of "employer"), and 903(a) (expanded situs provision in new Act). Despite the fact that more than three years have passed since the Amendment's effective date, litigation over the Act's new coverage is just now beginning to reach the courts. *See Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975). *See also I. T. O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080 (4th Cir. 1975), *rehearing en banc granted* (4th Cir. Mar. 12, 1976).

2. As shall appear *infra*, there is a dispute as to whether the Director is a proper party respondent in this Court, or whether his status is merely that of *amicus curiae*. In Part V of this opinion, we hold that the Director is a proper respondent.

3. New Section 919(d) provides that evidentiary hearings shall be held before hearing examiners. The administrative regulations relating to the Amendments make it clear that such hearing examiners are to be Administrative Law Judges. *See* 20 C.F.R. § 702.332 (1975).

4. Pursuant to Section 921(b)(3) of the new Act, the Benefits Review Board is authorized to hear appeals by any party in interest from the Administrative Law Judge's orders. The Board must base its decision upon the hearing record and is bound by a "substantial evidence" standard in its review of findings of fact. *Id.*

5. Jurisdiction over these appeals is conferred upon us by Section 921(c) of the new Act. Thereunder, a party aggrieved by a final order of the Board may obtain review of that order in the Court of Appeals for the federal judicial circuit in which the employee's injury occurred.

sense. Both sides have declined to assume certain exposed legal positions where they would quickly fall prey to the enemy's fire. Thus, respondents concede that the five accidents would not have been covered by the pre-1972 Act. Similarly, petitioners concede that the 1972 Amendments have broadened the Act's scope to include *some* shoreside injuries. The issue which divides the two camps is, of course, whether the Act was expanded far enough to reach *these* five injuries. We hold that the Board properly awarded benefits to two workers who were handling maritime cargo on shore, as well as to a carpenter who was fabricating parts for a new ship. However, the Board misconstrued the Act in extending coverage to the other two respondents, a shipboard worker who stumbled in front of his employer's office a mile from the ship, and an employee who was helping to tear down a shed in a disused marine repair facility.

Not content with merely jousting over the scope of the revised Act, three of the petitioners have broken ranks to seek out other *casus belli*. The petitioners in the *Halter Marine* case argue that the Act is unconstitutional if it covers injuries to shipbuilders on shore. In *Pfeiffer*, we are told that the Board violated the petitioners' right to due process by the method in which it awarded a fee to the claimant's attorney. The *Ayers Steamship* petitioners enter the lists with a plan to split the enemy forces; they claim that the Director is not a proper respondent in these appeals. As will hereinafter appear, we reject all of these additional contentions.

II

SCOPE OF THE 1972 AMENDMENTS

Of the many changes which Congress made in the Act in 1972, we are here concerned with only one: the extension of the Act's coverage inland to reach certain maritime-related injuries. Under the prior Act, coverage was overwhelmingly situs-oriented. As a general rule, an employee's injury was compensable if it occurred "upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law . . . ."[6] Interpretation of this provision was immensely complicated by a judicially created doctrine under which some "maritime but local" injuries could be covered by both state and federal compensation schemes. *See, e. g., Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962); *Davis v. Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942). However, the Supreme Court made it clear that, whatever the exact parameters of the "maritime but local" doctrine, the federal Act would generally be confined to injuries occurring over the waters. Thus, in *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 371 (1969), the Court held that the Act did not cover injuries to longshoremen who were working on a pier permanently affixed to the shore. Coverage was denied despite the fact that the workers had been injured while loading and unloading ships, an employment as maritime in nature as any land-based employment could

6. See former 33 U.S.C. § 903(a). There were certain exemptions from coverage, all of which have been carried over into the new Act. *See id., as amended*, § 903(a)(1) (masters and crew members; persons engaged by masters to service vessels under eighteen tons net); *id.* § 903(a)(2) (government employees); *id.* § 903(b) injuries caused solely by the employee's intoxication or willful conduct).

be.[7] The inequities of this "water's edge" division between covered and non-covered work were a major factor behind the decision to expand the scope of the Act.[8]

[1] Two of the Act's new sections are pertinent to the present appeals.[9] The first of these defines the status which the affected employee must occupy to bring his injury within the Act's coverage:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . 33 U.S.C. § 902(3).

The other provision describes the situs where a covered injury must occur:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). *Id.* § 903(a).

From these statutes, the general thrust of the new Act's coverage is clear. Congress has replaced the old "water's edge" analysis with a two-part test which requires (1) that the claimant have been engaged in "maritime employment" and (2) that the injury have taken place upon the situs specified in the Act.

[2, 3] The Act's definition of "maritime employment" is the focus of most of the legal controversy which rages in the parties' voluminous briefs. Unfortunately, much of this learned debate is of little relevance, if any, to the cases now before this Court. Counsel have drawn our attention to a host of pre-1972 decisions which discussed the meaning of the term "maritime employment" as used in the former Act. *See, e. g., Pennsylvania R. R. v. O'Rourke*, 344 U.S. 334, 73 S.Ct. 302, 97 L.Ed. 367 (1953); *Nalco Chemical Corp. v. Shea*, 419 F.2d 572 (5th Cir. 1969). Under the old Act, as under the present one, an employer was liable if he had one or more employees engaged in "maritime employment".[10] However, judicial constructions of the pre-1972 Act were necessarily limited by the "water's edge" approach of that statute.[11] For this reason, these older cases simply do not speak to the issue of what land-based employment is sufficiently "maritime" to be covered by the new Act.[12] Fortunately, Congress itself has answered that question. The terms of the statute allow coverage for an injured employee who was working as a longshoreman, a ship repairman, a shipbuilder, or a shipbreaker.[13] The legislative history tells us that an injured employee will be covered if he was "engaged in loading, unloading, repairing, or building a vessel",[14] but will not be covered merely because he was injured in the area defined by new Section 903(a).[15] In light of these indicia of Congressional intent, we must agree with the Court of Appeals for the Ninth Circuit that the new Act requires such a claimant to have been engaged in the work of loading, etc. *at the time of the injury. Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 960 (9th Cir. 1975). We therefore reject respondents' contention that an employee's general job classification (such as "longshoreman" or "ship repairman") will bring him within the Act's coverage regardless of the nature of the work which he was performing when he was injured.[16] In its reports, Congress has also indicated the extent to which coverage should be granted to persons who are not themselves loading, unloading, repairing, building, or breaking a vessel but who are nevertheless performing closely related functions. Thus, the House Report states that a checker would be performing covered work if he was "*directly involved* in the loading or unloading functions . . . ".[17] Our holding is that an injured worker is a covered "employee" if at the time of his injury (a) he was performing the work of loading, unloading, repairing, building, or breaking a vessel, or (b) although

7. Further underscoring the maritime context of these injuries was the fact that the injuries were caused by ships' cranes which had swung out of control. 396 U.S. at 213-14, 90 S.Ct. 347.

8. *See* H.R. No. 92-1441, 1972 *U.S.Code Congressional & Administrative News* at 4707.

9. None of the employers denies that it is an "employer" within the meaning of new Section 902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)

In any event, it is clear that this section requires merely that an employer have at least one employee engaged in "maritime employment" (the requirement of new Section 902(3)'s definition of an "employee") on the situs defined in new Section 903(a). Thus, if a claimant can satisfy Sections 902(3) and 903(a), his employer is automatically brought within Section 902(4).

10. Compare old 33 U.S.C. § 902(4) with new 33 U.S.C. § 902(4). As we have indicated *supra* note 9, the only way to read the new Act consistently is to give the words "maritime employment" in new Section 902(4) the same meaning as in new Section 902(3).

11. Not only, as noted was the "water's edge" doctrine applied to the situs of the claimant's injury, but the "maritime employment" of the employer's workers was required to take place "upon the navigable waters of the United States (including any dry dock)". See old 33 U.S.C. § 902(4).

12. The commendable diligence of counsel has uncovered some scattered dicta which might be read as suggesting the general nature of "maritime" work. *See, e. g., Pennsylvania R. R. v. O'Rourke, supra*, 344 U.S. at 339-40, 73 S.Ct. 302. These occasional pronouncements by the courts have, at best, only the most tenuous connection with the 1972 Amendments' extension of coverage to shoreside injuries. In comparison with the statutory language itself and the legislative history, the timeworn dicta which are urged upon us are entitled to little weight. Also, we note that none of the instant appeals involves an injury which occurred over the waters. Therefore, we need not, and do not, decide if the new Act made any changes in the coverage of such injuries.

13. 33 U.S.C. § 902(3).

14. In light of the statutory language, we regard the omission of shipbreaking from this passage as inadvertent.

15. "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." H.R. No.92-1441, 1972 *U.S.Code Congressional & Administrative News*, at 4708.

16. For the same reason we also cannot accept the notion that the official name of an employee's union or the language of a union's jurisdictional agreement is dispositive of the issue of coverage. It is the employee's work at the time of the injury which controls.

17. *Id.* (Emphasis supplied.) The same report also states that clerical employees who do not "participate in the loading or unloading of cargo" would not be covered by the new Act. *Id.*

he was not actually carrying out these specified functions, he was "directly involved" in such work.[18]

[4, 5] We specifically reject a theory which petitioners in the *Pfeiffer* and *Ayers Steamship* cases advance as the proper rule for cargo handling operations. They claim that the Act's coverage depends upon whether cargo has reached its shoreside "point of rest", as that term is used in the maritime industry.[19] To these petitioners, men who are handling cargo on its way to a vessel are not covered by the Act until that cargo reaches its last marshaling area prior to being taken on board a ship. Similarly, under this theory men who are unloading cargo from ships are performing covered work only until they reach the first marshaling area for cargo on shore. We are unable to find any support for such a hypertechnical construction of the 1972 Amendments.[20] In our view, if Congress had wished to adopt the "point of rest" as the test for coverage, it would have made that intention clear. As it is, the "point of rest" analysis is to be found neither in the statute itself nor in the legislative history. The closest approach to such a test appears in the following passage from the House Report:

> To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area . . . [E]mployees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered . . . H.R.No.92-1441, 1972 *U.S.Code Congressional & Administrative News*, at 4708.

In our opinion, these remarks establish no more than that workers who bring cargo to a storage area from on board ship are covered, while those persons (generally truckers or railroad personnel) who merely receive cargo and transport it inland are not covered. The House Committee in this passage did not even mention those employees who handle cargo between the first holding area and the cargo's departure via land transportation. It is precisely the treatment of this intermediate group of workers with which we are here concerned, and this

18. *See* Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments*, 6 Journal of Maritime Law and Commerce 1, 10 (1974). By this holding, we do not mean to suggest that future cases may not bring to light other types of covered work which cannot be characterized as loading, unloading, repairing, building, or breaking, and which are not "directly involved" with these five types of work, but which nevertheless are sufficiently similar to fall within the Congressional scheme. No such additional category of covered work appears in the cases before us, but we will not foreclose the possibility of such categories arising in future litigation.

19. The Federal Maritime Commission has defined the "point of rest" as follows:

> For the purpose of this section, "point of rest" shall be defined as that area on the terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading. 46 C.F.R. § 533.6(c) (1975).

20. A narrowly technical construction of the Longshoremen's and Harbor Workers' Compensation Act has traditionally been disfavored. *See, e. g., Luckenbach S.S. Co. v. Norton*, 106 F.2d 137, 138 (3d Cir. 1939).

passage is totally silent as to them. Elsewhere, as we have seen, the Committee indicated that employees who are directly involved in loading or unloading will be covered by the new Act. In the absence of explicit language which would establish a "point of rest" dividing line for shoreside cargo handlers, we will apply this general test to them as well.[21]

[6] Our interpretation of the new situs provision follows the same general lines as our construction of Section 902(3). Just as we choose to ignore the labels which an employer or a union has bestowed upon an employee, and instead rely upon the employee's work function at the time of the injury, likewise we will look past an area's formal nomenclature and examine the facts to see if the situs is one "customarily used by an employer in loading, unloading, repairing or building a vessel." The clear statutory scheme is to cover employees who are injured while performing certain types of work in an area which is customarily used for such work. Whether or not an employer or local custom has decided to designate an area as a "terminal", for example, is not dispositive of the situs issue. We will require that a putative situs actually be used for loading, unloading, or one of the other functions specified in the Act. As with the "maritime employment" test, we also interpret the Act as requiring that the situs meet the statutory requirements as of the time of the injury. It will not suffice if the area was so used only in the past, or if such uses are merely contemplated for the future.

III

THE COVERAGE ISSUE IN THESE APPEALS

[7-9] With the general tests for the amended Act's coverage in mind, we now turn to the specific facts of each of the present cases. In deciding each appeal, we must remember that the Act is to be liberally construed in favor of injured workers, *see Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953). We are also bound by a statutory presumption that an individual claim comes within the Act's coverage. ~~Title 33, United States Code, Section 920(a).~~ Finally, we will not set aside an award made by the Benefits Review Board so long as it is supported by substantial evidence on the record considered as a whole, and so long

21. In deciding how to interpret the Amendments and their legislative history, we have remembered that this Act is to be liberally construed in favor of injured employees. *See Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953). In our view, this principle requires us to resolve doubts as to the new Act's coverage in favor of a particular group of workers such as cargo handlers landward of the "point of rest".

Brief mention should also be made of the House Committee's announced intention "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity", H.R.No.92-1441, *supra*, at 4708. We agree that here the Committee was speaking of one inequity of the old "water's edge" approach, under which cargo handlers would walk in and out of coverage as they moved between ship and shore. However, we see no reason to treat this statement as a comprehensive description of the new Act's coverage, with the result that only those workers who spend part of their days upon the waters would be covered. In this passage, the Committee was merely addressing itself to one anomaly which it wished to eliminate. The same paragraph clearly states that checkers would be covered by the new Act, and the Committee gave no indication that coverage would depend on whether the checkers went on board ship. The test, rather, was to be whether they were "directly involved in the loading or unloading functions". *Id.*

as there is a reasonable legal basis for the Board's conclusions. *See O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508, 71 S.Ct. 470, 95 L.Ed. 403 (1951); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 478–79, 67 S.Ct. 801, 91 L.Ed. 1028 (1947).[22]

[10] A. *No. 75–1659.* Herbert Perdue was employed by Jacksonville Shipyards, Inc., as a shipfitter. On February 2, 1973, he performed repair work for a twelve-hour shift (7:00 a. m. to 7:00 p. m.) aboard an aircraft carrier which was berthed at the Mayport Naval Station in Jacksonville, Florida. At the end of the working day, Perdue took a bus to an office which his employer maintained approximately one mile from the carrier. The bus was provided by Perdue's employer, and the office was the place where Perdue had to "punch out" on a time clock before and after each shift. While alighting from the bus near the office, Perdue stumbled and injured his left knee in a fall upon the pavement. In our view, the Board should have sustained the Administrative Law Judge's determination that Perdue was not injured on a situs defined by new Section 903(a). There is literally nothing in the record to support a conclusion that the employer's office was on the navigable waters or in an "adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." The vessel upon which Perdue was working was a mile away, and the "punch out" office was a purely clerical and administrative post separated from the waters by other facilities which likewise were not used for loading, unloading, ship repair, or shipbuilding.[23] Under no reasonable construction of the Act did this area either "adjoin" the waters or carry out any of the functions specified in Section 903(a). We reject the argument that the new Act covers every point in a large marine facility where a ship repairman might go at his employer's direction. In the words of the Administrative Law Judge below, the locus of this injury had "nothing to do with loading, unloading, building or repairing vessels" (Appendix 7 at 9–19). Therefore we must reverse the Board's determination that Perdue is entitled to compensation under the new Act.

[11] B. *No. 75–2833.* Charles W. Skipper was another employee of Jacksonville Shipyards, Inc. For many years, he had been primarily engaged in ship repair work as a welder and burner. On the morning of February 8, 1974, Skipper reported for work as usual. However, instead of being assigned to his normal duties as a ship repairman, he was sent across the St. Johns River to a disused marine facility called the Southside Yard. There, he was to assist in tearing down a building which had formerly housed a fabrication shop. The purpose of dismantling this structure was to salvage some steel for use in constructing a plant which would manufacture sandblasting equipment. The activities of Jacksonville Shipyards, Inc., are quite diversified, and the contemplated plant was a new business venture. Skipper himself had previously from time to time been assigned work, such as this salvage operation, which did not involve

22. Although these cases were decided under the old Act, which provided for administrative adjudication by a deputy commissioner and for judicial review by a United States District Court, petitioners have offered no reason why the standard of review should be different under the present Act.

23. The parties have stipulated that the nearest body of water was 500 yards away from the office.

ship repair. On the day in question, Skipper was injured when some beams fell from the structure during the dismantling process and several steel fragments struck his forehead. At the time of the injury, all of the shops in the Southside Yard were closed, and no repair or fabrication work was being carried out there. Occasionally, ships would still be tied up at the pier in the Southside Yard, and repairmen or other workers would be sent from the employer's active facilities to work on these ships. However, such work would have no relationship to the various disused facilities in the Southside Yard, including the former fabrication shop in question, which was located between one hundred fifty and two hundred feet from the water. On these facts, we perceive no basis for the conclusion below that Skipper's injury is compensable under the new Act. Under no reasonable view was Skipper performing ship repair work at the time of his injury, nor was he carrying out any other of the types of work which the statute specifies as "maritime employment". We further hold that this salvage gang was not engaged in any work sufficiently similar to the statutory categories to be seen as a type of shoreside employment which was fairly within Congress' intent despite not being named in the 1972 Amendments. As we have already indicated, we refuse to attach controlling weight to an employee's regular job classification. Therefore, we will not consider Skipper a "ship repairman" under Section 902(3) merely because he normally performed ship repair work. We look only to his duties at the time of the injury, and these were decidedly not within the contemplation of the statute.

[12] It is equally clear that Skipper was not injured on a situs as defined in new Section 903(a). We have held that under Section 903(a) a covered situs must be "customarily used by an employer in loading, unloading, repairing, or building a vessel" *as of the time of the injury.* In this case, the Southside Yard shops had been inactive for approximately a year when Skipper was injured. No repair work or any other work specified by the statute was being performed in these buildings. Therefore, we must conclude that the former shops had lost their status as ship repair or shipbuilding facilities, and that Skipper was not injured on a Section 903(a) situs.

Because we reverse the administrative finding of coverage under the Act, we need not reach the other issues discussed by the parties, such as the propriety of the award which Skipper received for a facial scar and the various requests which the claimant's lawyers have made for attorneys' fees.

[13] C. *No. 75–2289.* In this case, the parties agree that the situs of the injury was within the contemplation of new Section 903(a), and the only dispute is whether the claimant was performing covered work. On April 12, 1973, Diversion Ford was injured at the port of Beaumont, Texas, while helping to secure a military vehicle to a railway flat car in preparation for its transportation inland. The vehicle in question had arrived either two or seventeen days prior to the date of the accident. Since then, it had remained in the immediate waterfront area. On the day before the injury, a gantry crane at the water's edge had lifted the vehicles onto the flat cars. Ford's work of fastening the vehicles to the flat cars was therefore the last step in transferring this cargo from sea to land transportation. On the other hand, the vehicles were not moved directly from the ship to the flat cars but instead

were taken first to a storage area. There is no dispute, then, that the "point of rest" for these vehicles had intervened since their arrival in port. However, we have today chosen not to adopt the "point of rest" theory of coverage for shoreside cargo handlers. In addition to the general reasons which we have already given for our conclusion, we cannot overlook the injustices which the proposed test would create in a case like this one. Petitioners apparently concede that Ford would be covered if his work were part of a continuous operation which began with the cargo's departure from a ship's hold. As respondents correctly point out, we are being asked to deny coverage purely because of a discontinuity in time created by the cargo's having been stored for a while along the shore. In contrast, under the test which we have adopted a shoreside worker like Ford would be covered if he was directly involved in "longshoring operations" such as unloading a ship. The work which Ford was performing was evidently an integral part of the process of moving maritime cargo from a ship to land transportation. Accordingly, we perceive an ample basis for the Board's determination that Ford was performing covered work, and we therefore affirm that decision.[24]

[14] D. *No. 75–2317.* On July 30, 1973, John L. Nulty was employed as a carpenter at a shipyard in Moss Point, Mississippi. At the time of his injury, Nulty was building a piece of woodwork which was to be installed in a new ship that had been launched but not yet commissioned. The ship was berthed about 300 feet from the fabrication ship where Nulty was working. The part which Nulty was fabricating was designed to hold a spare wheel on board the new ship. Most of Nulty's work was performed in the shop, although at times he would go on board a vessel to take measurements, or to install or repair some woodwork. The parties agree that a fellow employee known as a "shipfitter" would have picked up and installed the item which Nulty was building when he was injured. Under these facts, the Administrative Law Judge and the Benefits Review Board found that Nulty was working as a "shipbuilder" at the time of his injury and thus satisfied Section 902(3)'s definition of covered work. In our view, the only reasonable conclusion is that Nulty was directly involved in an ongoing shipbuilding operation. Under the test which we have adopted, then, Nulty is entitled to compensation under the new Act. We accordingly affirm the Board's finding of coverage.

[15] E. *No. 75–4112.* On May 2, 1973, Will Bryant was injured while working as a "cotton header" in a warehouse immediately adjacent to a pier in Galveston, Texas. At the port of Galveston, loads of cotton are first deposited at various shoreside warehouses by the inland shippers. The cotton is then placed upon dray wagons and taken to pier warehouses such as the one where Bryant was injured. The work performed by Bryant and other "cotton headers" is to unload the bales of cotton and stack them in pier warehouses. Two local unions, known to many as "cotton header's" and "longshoremen's" locals.

24. Petitioners' briefs are rich in references to the title of Ford's union (which was the "warehousemen's" rather than the "longshoremen's" union) and to the jurisdictional agreement between the two unions. As we have already indicated, we do not regard such matters as dispositive; instead, we look to the duties which a claimant was performing at the time of his injury.

have strictly divided waterfront operations between them. Generally, the cotton remains in these warehouses until other employees from the "longshoremen's" union take it on board ship. This storage period may last from less than one day to several weeks, although the average interval is about one week. At times, the cotton will be moved from one pier warehouse to another before being taken to a ship. In such cases, dray wagons are again used to carry the cotton, and "cotton headers" unload these wagons at the receiving warehouse. Occasionally, the cotton is moved directly from a dray wagon to a ship, in which event the work is performed solely by "longshoremen". The cotton which Bryant was handling at the time of his injury remained in the same warehouse for five days before "longshoremen" arrived to take the cargo aboard a vessel. On these facts, we affirm the Board's conclusion that the injury sustained by Bryant is within the Act's coverage. The situs was a pier-side warehouse in which cotton is stored temporarily before being taken on board ships. Usually, the cargo is taken directly from the warehouse to a ship. It is clear that Bryant was working on a waterfront area "customarily used by an employer in loading a vessel", and that therefore the requirements of Section 903(a) are met. We also will not set aside the Board's determination that Bryant was performing the work of an "employee" as defined in Section 902(3). We have already noted the established principle of liberal construction of this Act, and the statutory presumption that a claim is within the Act's coverage. Also, we are bound to respect the Board's conclusions if they are supported by the record and if they have a reasonable legal basis. In view of the limited nature of our review, we cannot say that the Board erred in defining Bryant's work status. As we here reiterate, we reject the notion that a "point of rest" such as the pier-side warehouse in this case marks the division between covered and uncovered work. We have no doubt that Bryant would be directly involved in "longshoring operations" if, instead of setting the cargo down, he had handed it to a "longshoreman" for immediate loading on board a ship. The brief discontinuity in time created by the cotton's temporary storage did not alter the essential nature of Bryant's work, which was an integral part of the ongoing process of moving cargo between land transportation and a ship. Clearly, there is adequate support for a conclusion that Bryant was directly involved in "longshoring operations" and therefore falls within the terms of Section 902(3). Thus, we affirm the Board's decision that the injury in this case is covered by the new Act.[25]

IV

A CONSTITUTIONAL QUESTION

[16, 17] It is earnestly argued by Halter Marine Fabricators, Inc., and its insurance carrier that the new Act is unconstitutional insofar as it extends coverage to shipbuilding employees who are injured on land. We are reminded that traditionally a contract to build a ship has not been considered to be within the admiralty jurisdiction,[26] and that admi-

25. Once again, we refuse to base our decision upon the designations of the two waterfront unions as "cotton header's" and "longshoremen's" or upon the terms of their jurisdictional agreements. Compare note 24, *supra*.

26. *See, e. g., Thames Towboat Co. v. The Francis McDonald*, 254 U.S. 242, 243, 41 S.Ct. 65, 65 L.Ed. 245 (1920).

ralty has traditionally included only those torts which occur upon the waters.[27] In the *Halter Marine* case, the employee was injured while working on land in furtherance of a shipbuilding operation. Therefore, we are told, Congress has exceeded the fixed boundaries of admiralty jurisdiction by covering work under a non-maritime contract which is performed on a situs outside the scope of traditional tort jurisdiction. In essence, the argument is that the sum of traditional admiralty tort and contract jurisdiction defines the absolute limits within which Congress may legislate under the Admiralty Clause.[28] We disagree with this proposition. No authority supports the notion that, in enacting a uniform compensation scheme for waterfront employees, Congress must find a "contract" or "tort" peg upon which to hang its legislation. The true analysis to be applied to such statutes is quite different. It must begin with the long-standing judicial recognition of Congress' broad powers to expand the reach of admiralty jurisdiction. Contrary to the impression created by petitioners' briefs, such judicially authorized expansion has often been geographical in nature. *See, e. g., The Genesee Chief*, 12 How. 443, 13 L.Ed. 1058 (1851), *overruling The Thomas Jefferson*, 10 Wheat. 428, 6 L.Ed. 358 (1825) (abandoning former limitation of admiralty jurisdiction to the tidewaters). The cases which approve the many changes which Congress has made in admiralty jurisdiction are replete with statements such as the following:

> The authority of the Congress to enact legislation of this nature [the Ship Mortgage Act, 46 U.S.C. §§ 911 *et seq.*] was not limited by previous decisions as to the extent of the admiralty jurisdiction. We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned
>
> *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 52, 55 S.Ct. 31, 41, 79 L.Ed. 176 (1934).

The Supreme Court has also consistently followed the view that this Congressional power "permits of the exercise of a wide discretion". *Panama R. R. Co. v. Johnson*, 264 U.S. 375, 386, 44 S.Ct. 391, 394, 68 L.Ed. 748 (1924). Our conclusion is that, in the exercise of its discretion, Congress could properly determine that "new conceptions of maritime concerns" justified the extension of compensation coverage to workers in the immediate waterfront area who participate in an ongoing shipbuilding operation. As the legislative history makes clear, Congress was concerned that under the former Act maritime workers were covered over the waters but not covered while performing similar or related work on shore. The inequities of the pre-1972 Act in this regard are obvious, and we feel that this concern was a legitimate reason for Congress to exercise its discretion. We also feel that this concern was a "maritime" one within the meaning of the Admiralty Clause. We have already indicated that, in defining "maritime" concerns, we will not be limited by the rules which apply to tort and contract litigation. In the present case, we are not considering whether Congress would authorize suits upon shipbuilding contracts or whether land-based torts could be made actionable by an admiralty statute.[29] We deal only with the case before us, and in our view Congress could reasonably have felt that shipbuilding employees beside the navigable waters were performing a sufficiently maritime function to be covered by a revamped harbor workers' compensation statute. We therefore cannot conclude that Congress exceeded its broad discretion by extending coverage to such work.[30]

27. *See, e. g., Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972).

28. Art. III, Section 2 of the Constitution extends the federal judicial power "to all Cases of admiralty and maritime Jurisdiction . . ." This clause has always been construed as empowering Congress to legislate in maritime matters. *See, e. g., Romero v. International Terminal Operating Co.*, 358 U.S. 354, 361, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959).

V

DIRECTOR A PROPER RESPONDENT

[18] This issue is before the Court in rather an odd fashion. In their main brief on appeal, the *Ayers Steamship* petitioners allege that the Director of the Office of Workers' Compensation Programs, United States Department of Labor, is not a proper respondent in this Court, although he could appear as *amicus curiae*. We decline to consider the merits of this contention. First, we note that petitioners have never moved to dismiss the Director as a respondent. In our view, the relief which petitioners seek—dismissal of the Director as a party and addition of him as *amicus curiae*—is properly requested by a motion pursuant to Rule 27 of the Federal Rules of Appellate Procedure. Under that Rule, a motion is the appropriate vehicle for making "an application for an order or other relief", a category which clearly includes the request which petitioners have made for the first time in their brief. Furthermore, even assuming that petitioners have adequately raised this point, we cannot overlook the fact that in the two *Jacksonville Shipyards* cases another panel of this Court has granted motions by the Director to be added as a party respondent. These legal determinations that the Director may properly appear as a respondent must be respected by this Court. As a general rule, one panel cannot overrule the precedents set by another panel, absent some intervening factor such as a new controlling decision of the Supreme Court. See *Davis v. Estelle*, 529 F.2d 437, 441 (5th Cir. 1976). No such factor is present in this case, and we will therefore allow the Director to remain before this Court as a respondent.

VI

DUE PROCESS

[19, 20] In the *Pfeiffer* case, the Benefits Review Board awarded an attorney's fee to counsel for the successful claimant. The fee covered only the work which was performed before the Board, and the manner of its award was as follows. Pursuant to the applicable regulation,[31] counsel presented his request for an attorney's fee, supported by a complete statement of the services which had been performed. Finding a fee of $1,000 to be "fair and reasonable

29. *See* 1 A *Benedict on Admiralty* § 94, at 5-15 (6th ed. 1973).

30. Because of our disposition of this issue, we need not reach the question of whether the 1972 Amendments were an exercise of Congress' power under the Commerce Clause as well as under the Admiralty Clause.

31. 20 C.F.R. § 702.132 (1975). The statutory basis for this regulation is 33 U.S.C. §§ 928(a) & (c), *as amended*.

for the work done in connection with these appeals", the Board approved an award in that amount, remanding the case to the Administrative Law Judge for determination of a fee for counsel's services at that level. Petitioners opposed the award, arguing that counsel had not "properly proved" the reasonableness of the fee and that petitioners should have an opportunity to offer evidence and to cross-examine counsel on the amount of his fee. The evidentiary hearing which they requested was alleged to be a requirement of the Fifth Amendment's Due Process Clause. The board rejected these arguments, and so do we. Government officials are, of course, required to minimize the risks of error and unfairness in the procedures by which one is deprived of life, liberty, or property. *See, e. g., Goss v. Lopez,* 419 U.S. 565, 581, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Mitchell v. W. T. Grant Co.,* 416 U.S. 600, 609–10, 618, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974). We feel that these risks were adequately minimized by the procedures which the Board followed. The Board was clearly able to evaluate the services which counsel performed before it. It was the Board which read counsel's briefs and observed his representation of the claimant in the administrative appeal. Thus, the fee which the Board granted was carefully limited to those services of which it had first-hand knowledge. Especially in view of the extremely generalized nature of petitioners' attack upon the fee's reasonableness, we cannot say that disposing of petitioners' objections without an evidentiary hearing was a violation of the Due Process Clause.

VII

CONCLUSION

For the foregoing reasons, the decisions of the Benefits Review Board in Nos. 75–1659 and 75–2833 are REVERSED. The Board's decisions in Nos. 75–2289, 75–2317 and 75–4112 are AFFIRMED in all respects.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX B

A-18

JUDGMENT OF UNITED STATES COURT OF APPEALS

United States Court of Appeals
For the Fifth Circuit

October Term, 1975

Your No. BRB 74-179

HALTER MARINE FABRICATORS, INC., and
FIDELITY & CASUALTY OF NEW YORK,
Petitioners

versus

JOHN L. NULTY and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents

Petition for Review of an Order of the Benefits Review Board, United States Department of Labor, (Louisiana case)

Before TUTTLE, THORNBERRY and TJOFLAT, Circuit Judges.*

JUDGMENT

This cause came on to be heard on the petition of Halter Marine Fabricators, Inc., and Fidelity & Casualty of New York for review of an order of the Benefits Review Board, Department of Labor and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Benefits

Review Board, Department of Labor in this cause be, and the same is hereby affirmed;

It is further ordered that petitioners pay to respondents, the costs on appeal to be taxed by the Clerk of this Court.

September 27, 1976

Issued as Mandate: October 27, 1976

*Judge Thornberry was a member of the panel that heard oral arguments but due to illness did not participate in this decision. 28 U.S.C. § 46(d) (1970).

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D.C. 20210

JOHN L. NULTY

Claimant-Respondent

v.

HALTER MARINE FABRICATORS INC.

and

FIDELITY & CASUALTY OF NEW YORK

Employer/Carrier
Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party in Interest

FILED AS PART OF THE RECORD
MAY 02 1975
(date)
Carolyn D. McGrady
(Clerk)
Benefits Review Board

BRB No. 74-179

DECISION

Appeal from Decision and Order of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Thomas J. Grace and C.E. Lugenbuhl, New Orleans, Louisiana, for employer-carrier.

John L. Nulty (Pro-Se), Escatawpa, Mississippi.

Linda L. Carroll (William J. Kilberg, Solicitor of Labor, Marshall H. Harris, Associate Solicitor), Washington, D. C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Hartman, Member:

This is an appeal by the employer-carrier seeking the reversal of a Decision and Order (74-LHCA-234) of Administrative Law Judge Samuel J. Smith awarding temporary total disability benefits from July 30, 1973 to September 9, 1973, and permanent partial benefits thereafter. The claim arises under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended 33 U.S.C. §901 et seq. (hereafter referred to as the Act).

The facts are essentially uncontroverted. Claimant was employed as a carpenter at the Moss Point, Mississippi, shipyard of Halter Marine Fabricators, an employer as defined by the Act, 33 U.S.C. §902(4). Claimant was injured on July 30, 1973, while working in the carpentry shop fabricating a block to hold a spare wheel for an off-shore supply vessel. The vessel was afloat in navigable waters approximately 100 yards from the shop area.

While claimant was using the table saw in the shop, the blade caught the wood and pulled his left hand through the saw, resulting in amputation of the thumb at the distal interphalangeal joint and the fourth (little) finger through the metacarpal joint. The claimant was temporarily totally disabled from July 31, 1973, to September 9, 1973. He returned to work September 10, 1973, with no further loss of wages. Employer-carrier has paid all medical expenses incurred by claimant and has paid disability benefits under

the Mississippi workmen's compensation act.

The administrative law judge found claimant to be a covered employee under the Act, 33 U.S.C. §902(3), and to be working within the scope of his employment at the time of injury. He ordered the employer-carrier to pay temporary total disability benefits for the period July 31 to September 9 with a credit allowed for any sums paid pursuant to the Mississippi state act plus interest at six percent on the difference. He further found a 40 percent permanent partial disability of the left hand and ordered that benefits for 97 6/7 weeks be paid with allowance for any sums already paid under the state act plus six percent interest on the amount past due; and that the employer-carrier be liable for the reasonable cost of future necessary medical treatment pursuant to 33 U.S.C. §907.

The constitutionality of the landward extension of the Act via the 1972 amendments was challenged by petitioners before the administrative law judge who stated in his decision that he is without authority to rule thereon.

Petitioners have presented three issues on appeal.

1. Claimant was not a covered employee within the meaning of Section 2(3) of the Act. Specifically, claimant was not himself engaged in maritime employment at the time of the injury.
2. The administrative law judge erred in finding a

40 percent permanent partial disability to claimant's left hand in that there is not substantial evidence in the record as a whole to support such a finding.

3. Alternatively, if claimant is a covered employee within the meaning of the Act, as amended, then the Act is unconstitutional in that it exceeds the Admiralty and Maritime jurisdiction granted in the Constitution of the United States.

The Board agrees with the administrative law judge's conclusion of coverage. The employer admits being an "employer", as defined by Section 2(4) of the Act, 33 U.S.C. §902(4), since his principal business is new ship construction. The employer further admits that claimant is an employee but asserts that claimant is not himself a covered employee pursuant to Section 2(3) of the Act because claimant is not engaged in maritime employment. This argument will not bear close examination. Section 2(3) of the Act defines "employee" to be "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder. . . ." (emphasis added). 33 U.S.C. §902(3).

The employer is in the business of new ship construction--shipbuilding. Claimant is among those employees whose work contributes to this construction. On the day he was injured,

claimant was fabricating a block to hold a spare wheel for an off-shore supply vessel. The Board finds this to be an essential aspect of the employer's shipbuilding enterprise and thus maritime employment within the meaning of the Act. 33 U.S.C. §902(3).

The Board applies a twofold test to determine coverage under the Act. The first area of inquiry, addressed above, involves a determination of the employer/employee relationship, i.e., is the claimant an employee of an employer engaged in maritime employment? Since this question can be answered affirmatively the situs of the injury must be examined.

Section 3(a) of the Act extends coverage inland beyond the waters' edge and includes "...any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel." (emphasis added) 33 U.S.C. §903(a). Stipulations in the record together with exhibits indicate de facto coverage in that claimant was obviously working in an area customarily used for building a vessel. At the time of the injury, claimant was fabricating a block for a vessel already launched and secured in the navigable waters of the United States. The Board finds such fabrication to be both shipbuilding and maritime employment and to have occurred in an area customarily used for building a vessel. 33 U.S.C. §§902(3), 903(a).

Although not certified as such, the degree of disability has been placed in issue. The Board takes note of those portions of the record relevant to claimant's disability: Dr. Enger, the physician retained by the employer, states in his report of treatment that claimant has suffered two amputations, one of the left thumb at the distal interphalangeal joint resulting in a 50% permanent partial disability to the thumb as well as amputation of the left fourth (little) finger at the matacarpal joint resulting in 100% permanent partial disability of this finger.

In a letter dated May 1, 1974, following his final examination of claimant, Dr. Enger states: "Using tables to combine these two figures [50% of thumb and 100% of fourth finger] this would be a thirty percent permanent partial disability to the left hand." There is no other medical testimony in the record.

In his memorandum of transmittal pursuant to 20 C.F.R. §702.104 dated May 1, 1974, the deputy commissioner states: "Permanent impairment has been determined to be 50 percent loss of the thumb and 100 percent loss of the fourth finger which constitutes or is translated into 35 percent loss of use of the hand." And further on "...for such impairment, the employee is entitled to compensation for 85.4 weeks (244 [weeks] x 35 percent) ...." [33 U.S.C. §908(c)(3) requires that two hundred forty-four (244) weeks compensation

be paid for permanent total disability of a hand and that a percentage of those weeks of compensation be paid for permanent partial disability according to the percent of partial disability awarded.]

The administrative law judge in his Decision and Order as amended, found, pursuant to 33 U.S.C. §908(c)(17), [1/] that "Claimant has lost the constructive use of two of five fingers, which this Administrative Law Judge determines to be a forty (40%) percent permanent partial disability to the left hand."

It is solely within the province of the administrative law judge to accept or reject all or any part of any testimony. Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 U.S. 459, 467, reh. denied, 391 U.S. 929 (1968). This Board must respect the fact finder's evaluation of the credibility of witnesses, including medical witnesses. John W. McGrath Corp. v. Hughes, 289 F.2d 403, 405 (2nd Cir. 1961). Further, the administrative law judge is vested with discretion to select reasonable inferences from the evidence as a whole, and these inferences are to be upheld on review. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). Board review of findings of fact of an administrative law judge is limited to determining whether

1/ Two or more digits: Compensation for loss of two or more digits or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot. 33 U.S.C. §908(c)(17).

or not the decision under review is supported by substantial evidence in the record as a whole. 33 U.S.C. §921(b)(3).

In the instant case the Board finds there is substantial evidence in the record to support the administrative law judge's award of 40% permanent partial disability to the left hand. Dr. Enger speaks to "medical disability" when he consults tables to determine a disability rating. But disability is an economic concept under the Act, not a medical evaluation. See American Mutual Insurance Co. of Boston v. Jones, 426 F.2d 1263 (D.C. Cir. 1970), wherein the court states that the degree of disability cannot be measured by physical condition alone, but that claimant's age, his industrial history and the availability of that type of work which he can do, must be considered. Applying these parameters to claimant herein, a man whose trade requires considerable manual dexterity, the constructive loss of two of five fingers is significant and substantial. Viewed in this light a 40% permanent partial disability rating for the left hand is reasonable.

The Board notes that no demand has been made for assessment of a penalty pursuant to Section 14(e). 33 U.S.C. §914(e). Section 14(a) of the Act directs that compensation "...shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer." 33 U.S.C. §914(a). "Promptly" is defined to

be on or before the fourteenth day after the employer has knowledge of the injury. 33 U.S.C. §914(d). Failure to pay any installment of compensation due under the Act promptly, mandates assessment of a penalty equal to 10 percentum of any installment past due unless notice of controversion is given by the employer pursuant to Sections 914(d), (e).

In the instant case, compensation payments due under the Act were not timely made nor does the record indicate notice of controversion pursuant to Section 914(d). The Board has, in similar instances, held assessment of this penalty to be mandatory. McCabe v. Ball Builders, 1 BRBS 290, BRB No. 74-181 (Jan. 31, 1975).

The Decision and Order of the administrative law judge provides for payment of compensation for 97 6/7 weeks. However, the Board finds that compensation is due for 97.6 weeks (244 weeks x 40 percent), and the assessment of a ten percent penalty is required consistent with this opinion unless non-payment of compensation is excused for good cause shown pursuant to Section 914(e).

The constitutionality issue on appeal with respect to the validity of the landward extension of the Act to cover employees in "adjoining areas" has been fully discussed in Coppolino v. I.T.O. Co., Inc., 1 BRBS 205, BRB No. 74-136 (Dec. 2, 1974). There is no reason to reiterate that discussion here.

The Decision and Order is hereby remanded to the administrative law judge for further appropriate action.

Ralph M. Hartman, Member

We Concur:

Ruth V. Washington, Chairperson

Julius Miller, Member

Dated this 2nd day
of May, 1975

SERVICE SHEET

BRB No. 74-179: JOHN L. NULTY v. HALTER MARINE FABRICATORS, INC. AND FIDELITY AND CASUALTY OF NEW YORK (74-LHCA-234)

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APPENDIX D

A-31

DECISION AND ORDER OF U.S. DEPARTMENT OF LABOR

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Washington, D.C. 20210

IN THE MATTER OF
JOHN L. NULTY
Claimant

vs.

Case No. 74-LHCA-234
(Formerly 7--24690)

HALTER MARINE FABRICATORS, INC.
Employer

and

Received - BEC
Sep. 4, 1974 7th District

FIDELITY & CASUALTY OF NEW YORK
Claimant

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Counsel for Employer and Carrier

Before SAMUEL J. SMITH
Administrative Law Judge

DECISION AND ORDER

Jurisdiction and Procedural History

This is a claim for compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901, *et seq.*, filed by John L. Nulty. This case is before the undersigned Administrative Law Judge upon the transmittal by Deputy Commissioner Robert J. Shea, for formal hearing in accordance with the Act and Regulations governing the administration of the Longshoremen's and Harbor Workers' Compensation Act, as amended.

A hearing in this matter was held before the undersigned Administrative Law Judge in New Orleans, Louisiana, on July 12, 1974, at which time the Claimant appeared *Pro Se*. The Employer and Carrier were represented by C.E. Lugenbuhl and Thomas J. Grace of the New Orleans law firm of Lemle, Kelleher, Kohlmeyer & Matthews. James G. Johnston, Associate Solicitor, filed an entry of appearance on behalf of the Director, Office of Workmen's Compensation Programs, Department of Labor. The Solicitor's Office did not appear in person at the hearing but reserved the right to file a brief on behalf of the Director.

The Claimant filed an application for benefits under the Longshoremen's and Harbor Workers' Compensation Act as the result of injuries which he sustained on July 30, 1973, at which time he was employed by Halter Marine Fabricators, Inc., as a carpenter at Halter's Moss Point, Mississippi, shipyard.[1]

1. Halter Marine Fabricators, Inc. owns and operates a shipbuilding yard at Moss Point, Mississippi, where offshore supply vessels are constructed. See Employer-Carrier Exhibits A and B which depict the shipyard via aerial photograph.

At the time of Claimant's injury he was fabricating a block of wood which was to hold the spare wheel of an offshore supply vessel which had been launched and was upon the navigable waterways of the United States, approximately 300 feet from the ship in which Claimant was working. While working on said block of wood with a tablesaw, the saw blade caught the wood and pulled the Claimant's left hand through the saw. As a result of his injury Claimant sustained amputation of the left thumb at the distal interphalangea joint and left fourth (little finger) through the metacarpal joint.

The Employer and Carrier have refused to pay the Claimant benefits under the Longshoremen's and Harbor Workers' Act. However, payment has been made to the Claimant under the Mississippi Workmen's Compensation Act.[2] Informal proceedings before Commissioner Shea did not result in a settlement of the issue in dispute.

Stipulation of Parties

At the beginning of the hearing the Claimant and Counsel for, the Employer and Carrier agreed to the following stipulations:

(1) The Claimant was injured on July 30, 1973, at which time he was employed by Halter Marine Fabricators, Inc., as a carpenter at Halter's Moss Point, Mississippi, shipyard.

(2) At the time of his injury Claimant was fabricating a block of wood which was to hold a spare wheel of an offshore supply vessel which had been launched and was upon the navigable waters of the United States.

(3) Claimant was working on the block of wood in a shop where he fabricated lockers, bunks,

2. See Employer-Carrier Exhibits D, E and F.

and furniture, etc., for the vessels. The shop was located approximately 300 feet from the vessel, for which the part was being fabricated.

(4) The tablesaw which the Claimant was using to shape the block of wood caught the wood and pulled the Claimant's left hand through the saw. As a result the Claimant sustained amputations of the left thumb at the distal interphalangea joint and left fourth (little finger) through the metacarpal joint.

(5) Permanent impairment has been determined to be 50 percent loss of the thumb and 100 per cent loss of the fourth finger which constitutes or is translated into 30 per cent loss of use of the hand.

(6) Claimant's average weekly wages at the time of his injury was $184.26 per week.

(7) Claimant was disabled from the period July 31 to September 9, 1973, and that he returned to work on September 10, 1973, with no further loss of wages.

Issues

This case raises two issues: (1) whether or not the Act, as amended, extends coverage to the work activities of the Claimant, a carpenter, who was fabricating a part for a supply vessel which was being constructed and had been launched upon the navigable waters of the United States, at the time of his injury on July 30, 1973; (2) whether or not the 1972 amendments to the Act is constitutional insofar as the amendments extend coverage to injuries occurring on land.[3]

3. An Administrative Law Judge is without authoirity or jurisdiction to declare an Act of Congress unconstitutional.

Summary of Evidence

The Employer, Halter Marine Fabricators, owns and operates a shipyard at Moss Point, Mississippi, where offshore supply vessels of approximately 190 feet in length are constructed. These vessels are constructed to carry supplies, men and equipment, to offshore oil rigs in the Gulf of Mexico and worldwide. Approximately nine months is required to construct such a vessel, of which time approximately eight months is required to assemble and launch the vessel, with the other one month used to outfit the vessel, once launched.

The Claimant was employed as a carpenter to build and fabricate furniture and various pieces of woodwork that went on the vessels being constructed. Most of the furniture and woodwork fabricated by the Claimant was installed on the vessels prior to launch. However, the particular piece being constructed at the time of Claimant's injury was for a vessel which had already been launched. The most of Claimant's work was performed in a shop which is adjacent to the assembly areas and launchway.[4] Occasionally, Claimant would have to go aboard a vessel once it was launched to install or replace certain parts or pieces which he had fabricated in the shop. At the time of his injury Claimant was fabricating a piece of wood which was to hold the spare wheel of an offshore supply vessel which had already been launched.

A series of medical reports by Daniel J. Enger, M.D., an orthopedic surgeon,subtantiates the stipulation of the parties as to the nature of the injury to the Claimant and resulting disability. (Employer-Carrier Exhibits G, H. I, and J).

4. See Employer-Carrier Exhibits A and B. Claimant's usual work occurred in the shop building which is identified in both photographs with the number 6.

While a claim for compensation was made pursuant to the Longshoremen's and Harbor Workers' Compensation Act, as amended, there are exhibits which have been made a part of the record in this case which shows payments to the Claimant under the Mississippi Workmen's Compensation Law. (Employer-Carrier Exhibits A and B).[5]

Evaluation of Evidence and Law

The record in this case considered as a whole, to include the sworn testimony, exhibits and stipulations clearly indicates that the Claimant sustained an injury to his left hand which rendered him disabled from July 30, 1973, the date of the injury, until September 9, 1973, when he returned to work. The record further indicates that Claimant has also suffered at least thirty (30) percent permanent disability to his left hand.

The Claimant believes that he is entitled to benefits under the Longshoremen's and Harbor Workers' Compensation Act, since the Act, as amended, extends coverage to employees sustaining injuries in areas customarily used by their employer in building vessels. He was helping to build a vessel at the time of his injury, thus he is entitled to benefits under the Act.

The Employer-Carrier on the other hand, contends that the Claimant is not entitled to benefits under the Act, since his employment was not such to place him in maritime employment at the time of his injury on July 30, 1973. The Employer-Carrier contends in the alternative that the Act, as amended, is unconstitutional insofar as it extends coverage to injuries occurring on land.

This Administrative Law Judge does not have authority to rule on the constitutionality of the Act, as amended, and

5. See Employer-Carrier Exhibits A and B, *supra*.

accordingly advised Counsel for the Employer-Carrier at the hearing. Thus the only issue which will be disposed of in this proceeding concerning whether or not the work activity of the Claimant at the time of his injury on July 30, 1973, is covered under the Act, as amended.

If the Claimant is to prevail in this case he must come within the coverage contained in the Act at 33 U.S.C. § 903(a), as amended, which provides:

> "(a) Compensation shall be payable under this chapter in respect of disability or death of *an employee,* but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an *employer* in loading, unloading, repairing or building a vessel). . . ."[6]
> [Emphasis added].

Thus in order to come within Section 903(a) of the Act above cited, the Claimant must be an "employee." The definition of an "employee" is found at 33 U.S.C. § 902(3) which provides:

> "(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in long-

6. Prior the amendment of the Act by Congress in 1972, a Claimant was required to meet a more restrictive situs requirement, in that the death or disability had to occur upon the navigable waters of the United States, including any dry dock. In *Nacirema v. Johnson,* 396 U.S. 212 (1969), the Supreme Court rejected the contention that in order to fulfill the coverage requirements of the 1927 Act, the employee must have been *either* injured in the situs required by the Act, *or* meet the status of being a longshoreman employed in the performance of a maritime contract. The Supreme Court found that Congress had provided coverage based on situs alone.

> shoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker,. . ."

Furthermore, it is necessary that the Claimant not only be an "employee" within the meaning of the Act, as amended, but that he must also work for an "employer." The definition of an "employer is found at 33 U.S.C. § 902(4), which provides:

> "(4) An employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."[7]

Before applying the above definitions of "employee" and "employer" to the facts and evidence in this matter, a review of the legislative history of the Act, as amended, would appear to be helpful.

The Subcommittee on Labor of the Committee on Labor and Public Welfare of the United States Senate in its report of December 1972,stated:

7. It should be noted that prior to the amendment of the Act, the term "employee" was defined only in the negative. An "employee" need only work for an "employer" in whole or in part, upon the navigable waters of the United States, including any dry dock. Further, it was sufficient, if the "employer" of the injured or deceased Claimant had *any* employees engaged in maritime employment. *Pennsylvania R. R. Co. v. O'Rourke,* 344 U.S. 334 (1953). Furthermore, it was immaterial that the Claimant at the time of the injury was not engaged in maritime employment. *O'Rourke, Supra. Peter v. Arrien,* 325 F. Supp. 1361 (E.D. Pa.), *aff'd,* 463 F. 2d 252 (3rd Cir. 1971).

"The Committee believes that the compensation payable to a longshoreman or a ship repairman or building should not depend on the fortuitous circumstances of whether the injury occurred on land or over water. Accordingly, *the bill would amend the Act to provide coverage* of longshoremen, harbor workers, ship repairmen, *ship builders,* shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, *or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing or building a vessel.*"[8]
[Emphasis Added].

Thus it is clear that Congress intended to extend coverage under the Longshoremen's and Harbor Workers' Compensation Act to shipbuilders who are injured either on the navigable waters of the United States or other area customarily used by an employer in building vessels. It is also very clear that Congress considered shipbuilders too, engaged in maritime employment.[9]

The next question which must be resolved is whether or not the Claimant was a shipbuilder at the time of his injury. To make such a determination it is necessary to examine the

8. See *Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (S. 2318, Public Law 92-576)* prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, December 1972, U.S. Government Printing Office, p. 75.

9. In the Act prior to the Amendments in 1972, the term "maritime employment" was not specifically defined to include shiprepairmen and shipbuilders. Thus as a result of the 1972 Amendments to the Act, it is clear that a shipbuilder is in fact an "employee" within the meaning of the Act.

Claimant's work activities at the time that the injury occurred. Jack P. Edwards the Personnel Director of the Employer who testified at the hearing indicated that the Claimant, a carpenter, built furniture and various other pieces of woodwork that became permanent fixtures aboard the vessels that were being constructed. The items which the Claimant built and/or fabricated were mostly affixed aboard the vessel prior to its being launched. However, after the launch the Claimant would have to go aboard to install or repair certain other items, to a limited extent. The Claimant testified that he fabricates most of the bunks, lockers and other furniture that goes aboard the vessels being constructed. Most of his work is performed inside the shop area, however, he occasionally would have to go aboard to get measurements and install picture frames and do touch-up work.

It seems obvious that the Claimant's duties are both essential and vital to the construction of the offshore supply vessels which the Employer constructs. Clearly the Claimant is a part of a group of workmen who were employed by Halter as the part of a total operation with the sole purpose of constructing offshore supply vessels. Some of the workmen are shipfitters and carpenters others are electricians, and still others are sheet metal workers and fabricators. They all work at various stages in the construction of a vessel until its launch and final fitting. The efforts of all of these workmen are necessary to construct such a vessel. This Administrative Law Judge does not believe that Congress intended to deny the protection of the Act, as amended, to employees such as the Claimant while granting it to other employees who may have been in a different location or performing a different job. A valid distinction cannot be made between the Claimant who fabricates the ships furniture and the other workmen who perform their respective roles in the total operation. To do so would not be within the humanitarian goals of the Act.

Therefore, it must be concluded that all of these facts taken as a whole, along the statutory presumption of compensability, lead to the inescapable conclusion that the Claimant was a "shipbuilder" and thus on the date of his injury on July 30, 1973, he was an "employee" within the meaning of the Act, as amended.

Likewise, it seems equally clear that a substantial number of the Employer's employees were engaged in maritime employment, in various areas utilized by the employer in the building of offshore supply vessels. Thus it must be concluded that the Employer (Halter) is an "employer" within the meaning of the Act, as amended.

Finally, it is concluded that the Claimant is a "shipbuilder" within the meaning of the Act, as amended, who was injured during the course of his employment, in an area utilized by his employer in the building of vessels, and thus is entitled to coverage under the Longshoremen's and Harbor Workers' Compensation Act, as amended.

Consideration must now be given to the benefits that the Claimant is entitled to receive under the Act. Based upon the evidence and stipulations it would appear that the Claimant who was injured on July 30, 1973, was disabled and unable to return to work until September 10, 1973. Thus the Claimant lost five and six/sevenths (5-6/7) weeks work as a result of his injury. Further, based upon the evidence and stipulations, it would appear that the Claimant, based on an average weekly wage of $184.26, is entitled to a weekly benefit of $122.84 per week.

It is further determined that the Claimant has sustained a thirty (30) percent permanent partial disability to his left hand and is entitled to ninety-seven and six-sevenths (97-6/7) weeks compensation at the rate of $122.84 per week.[10]

10. Applying 33 U.S.C. 908(c) (17), it is concluded that the Claimant has lost the constructive use of two of five fingers, which this Administrative Law Judge determines to be a forty (40%) percent permanent partial disability to the left hand.

Since the Claimant did not utilize the services of Counsel it would be inappropriate to assess attorney fees against the Carrier under Section 28(a) of the Act.

It is also appropriate to set out that the Claimant is entitled to have the Employer and Carrier provide and pay for the reasonable cost of such medical treatment as the nature of the Claimant's injury may require.

Findings

After careful review of the entire record in this case, and based upon the preponderance of the credible evidence, specific findings are made as follows:

(1) The Claimant has filed an application for benefits under the Longshoremen's and Harbor Workers' Compensation Act, as amended.

(2) The Claimant sustained the partial amputation of the left thumb and complete loss of the fifth finger of the left hand as the result of an injury which occurred on July 30, 1973, while he was an employee of Halter Marine Fabricators, Inc.

(3) The Claimant was working within the scope of his employment at the time the injury occurred.

(4) The Employer received timely notice of the injury within the meaning of the Act, as amended.

(5) At the time of said injury, the Claimant was an "employee" within the meaning of the Act, as amended, and was working for an "employer" within the meaning of the Act,

as amended, and further his injury occurred in an area customarily used by the Employer in the building of ships and vessels.

(6) The Employer, Halter Marine Fabricators, Inc., is subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

(7) At the time of his injury the Claimant was entitled to weekly benefits of $122.84 per week under the Act.

(8) The Claimant is entitled to 5 and 6/7 weeks of total disability benefits for the period July 30, 1973, through September 9, 1973.

(9) The Claimant is entitled to permanent partial disability benefits for 97 and 6/7 weeks as the result of a forty (40%) per cent permanent partial disability to his left hand.

(10) The Claimant is entitled to have the Employer and Carrier pay for the reasonable cost of such medical treatment and care as the nature of the Claimant's injury may require.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

(1) The Employer (Halter Marine Fabricators, Inc.)/Carrier (Fidelity and Casualty of New York) shall pay to the Claimant, compensation for temporary total disability at the rate of $122.84 per week for 5 and 6/7 weeks for a total principal sum of $719.44, plus interest

at the rate of six (6) percent per annum, computed from the date each payment was originally due. *Humble Oil and Refining Co. v. Taliafero,* (BRB-Labor No. 107-73, June 1, 1973). The above sum shall be paid less any sums which may have been paid pursuant to the Workmen's Compensation Act of the State of Mississippi.

(2) The Employer/Carrier shall pay to the Claimant, compensation for forty (40%) percent permanent partial disability to his left hand, at the rate of $122.84 per week for 97 and 6/7 weeks, for a total principal sum of $12,020.71. The above sum shall be paid less any sum which may have been paid pursuant to the Workmen's Compensation Act of the State of Mississippi.

(3) The Employer/Carrier shall provide and pay for the reasonable cost of such medical treatment and care as the nature of the Claimant's injury may require.

s/ Samuel J. Smith
SAMUEL J. SMITH
Administrative Law Judge

Dated: August 23, 1974
Washington, D.C.

APPENDIX E

SUPPLEMENTAL DECISION AND ORDER

U. S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Washington, D. C. 20210

In the Matter of

JOHN L. NULTY
Claimant

v.

HALTER MARINE FABRICATORS, INC.
Employer

Case No. 74-LHCA-234
OWCP No. 7-24690

and

FIDELITY AND CASUALTY OF NEW YORK
Carrier

SUPPLEMENTAL DECISION AND ORDER

Jurisdictional and Procedural History

This is a claim for compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (Hereinafter referred to as the Act), as amended. (33 U.S.C. §901, *et seq.)*. Pursuant to due notice a hearing was held in New Orleans, Louisiana on July 12, 1974. The undersigned Administrative Law Judge issued a "Decision and Order" on August 23, 1974, and a "Supplemental Decision and Order" on October 24, 1974.

Subsequently the Respondents appealed the aforementioned decisions to the Benefits Review Board, United States Department of Labor. On May 2, 1975, the Benefits Review Board rendered its "Decision", affirming in part the "Decision and Order" of the undersigned Administrative Law Judge. The Board remanded the case for consideration of: (1) the assessment of a penalty against the Respondents pursuant to Section 14(e) of the Act (33 U.S.C. §914(e); (2) a minor adjustment to the period which benefits are payable to the Claimant.

On May 8, 1975, Stephen Clarkson, Esq., of the Washington, D.C. law firm of Sullivan, Beauregard and Clarkson, contacted the undersigned Administrative Law Judge on behalf of the Respondents,concerning the remand provision of the Board's "Decision" with respect to the penalty. Counsel indicated that he was attempting to work out a stipulation with the Office of the Solicitor of Labor, with respect to the penalty issue. Counsel further indicated that he would advise the undersigned Administrative Law Judge of any such stipulation. Since the undersigned was not advised of any agreement or stipulation with respect to the penalty issue, an Order was entered on June 4, 1975, giving the Respondents ten (10) days from the receipt of said Order, within which *TO SHOW CAUSE*, why a ten percent (10%) penalty should not be imposed against them, as provided for in Section 24(e) of the Act. (33 U.S.C. §914(e)).

The Respondents by Counsel Stephen B. Clarkson, responded to the *SHOW CAUSE ORDER* by letter dated June 13, 1975, wherein the Respondents asserted that this Administrative Law Judge is without jurisdiction to comply with the *Remand Order* of the Benefits Review Board-Labor, since the case in its entirety is presently pending appeal before the United States Court of Appeals for the 1 ifth Circuit.

Issue

The sole issue contained in the Benefits Review Board remand with reference to the Section 14(e) penalty, is whether or not good cause existed for the non-payment of compensation by the Respondents to the Claimant, as set forth in Section 14 of the Act. (33 U.S.C. § 914).

Evaluation of Evidence and Law

The procedure for the appeal of a compensation order is provided for in Section 21 of the Act, as amended (33 U.S.C. § 921) which provides in part:

> "21(b) (4) The Board may, on its own motion or at the request of the Secretary, remand a case to the hearing examiner for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board."[1]
>
> "21(c) Any person adversely affected or aggrieved by a *final order* of the Board may obtain a review of that order in the United States Court of Appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside . . [Emphasis added]

Clearly the Respondents had the right to appeal the final order of the Benefits Review Board dated May 2, 1975, to the United States Court of Appeals for the Fifth Circuit. However that right is limited to those matters contained in the Benefits Review Board's *final order*. The *final order* of the Benefits Review Board did not make an adjudication or

1. Hearing Examiners have been redesignated as Administrative Law Judges by the United States Civil Service Commission.

final determination of the Section 14(e) penalty issue, since pursuant to Section 21(b)(4) of the Act, cited above, the Benefit Review Board remanded the case to this Administrative Law Judge for determination of the Section 14(e) penalty provisions.

In accordance with the remand order of the Benefits Review Board, this Administrative Law Judge is obligated to make a determination of the Section 14(e) penalty, which determination the Respondents can appeal to the Benefits Review Board. Once the Benefits Review Board has entered its final order with respect to the Section 14(e) penalty issue, *then and only then* will an appeal properly lie with the United States Court of Appeals for the Fifth Circuit,with respect to the penalty issue.

Respondents were afforded ample opportunity to show cause, why the ten percent (10%) penalty, contained in Section 14(e) of the Act, should not be imposed against them. However, Respondents have not offered any explanation or evidence, since their assertion concerning the jurisdiction of this Administrative Law Judge. Thus a determination of the Section 14(e) penalty issue must be made based on the record as it now stands.

Section 14(b) of the Act directs that "the first installment of compensation shall become due on the fourteenth day after the employer has knowledge of the injury or death. . ." Thus the Respondents had the obligation to either (1) make voluntary payments to the Claimant, or (2) file a notice of controversion,within fourteen (14) days after they had knowledge of the Claimant's injury. A failure to do either, results in the mandatory imposition of the ten percent (10%) penalty provided for in Section 14(e) of the Act, unless excused for good cause.

The Respondents had knowledge of the injury to the Claimant on July 30, 1973, the date of said injury. Thus

the Respondents had fourteen (14) days from July 30, 1973, within which to (1) make voluntary payments to the Claimant, or (2) file a notice of controversion; however, the Respondents did not do either. The Respondents could have avoided the Section 14(e) penalty in this case by notifying the Deputy Commissioner of the Seventh Compensation District, United States Department of Labor, in New Orleans, Louisiana, of the injury to the Claimant, and further indicating their refusal to pay compensation under the Act, to the Claimant on the theory that the 1972 amendments to the Act were unconstitutional.

It is thus determined that the Respondents have not complied with the provisions of Section 14 of the Act, and thus the assessment of a ten percent (10%) penalty is required by Section 14(e) of the Act.

Findings

The following specific findings are made:

1. The final order of the Benefits Review Board dated May 2, 1975, did not make an adjudication or final determination of the Section 14(e) penalty issue.

2. The Benefits Review Board had authority pursuant to Section 21(b) (4) to remand the Section 14(e) penalty issue to the undersigned Administrative Law Judge for further proceedings consistent with their remand instructions.

3. This Administration Law Judge has jurisdiction to make a determination of the Section 14(e) penalty issue consistent with the Benefits Review Board's remand.

4. Respondents had knowledge of the injury to the Claimant on July 30, 1973, within the meaning of Section 14(b) of the Act (33 U.S.C. § 914(b).

5. Respondents did not make voluntary payment of compensation, under the Act to the Claimant, or file a controversion within fourteen (14) days after July 30, 1973.

6. Respondents have not set forth any reason, or shown good cause, sufficient to excuse their non-compliance with Section 14 of the Act.

7. Respondents should be assessed a ten percent (10%) penalty, pursuant to Section 14(e) of the Act on all unpaid compensation payments, provided for in the Decision and Order of the undersigned Administrative Law Judge dated August 23, 1974.

8. The Benefits Review Board finding on page 9 of its final order, dated May 2, 1975, that the compensation is due the Claimant for 97.6 weeks, instead of 97 and 6/7 weeks does not require further determination by this Administrative Law Judge.

ORDER

IT IS THEREFORE ORDERED that the Respondents pay to the Claimant a ten percent (10%) penalty, pursuant to Section 14(e) of the Act, on *all unpaid* compensation payments, provided for in the Decision and Order of the undersigned Administrative Law Judge dated August 23, 1974, as amended by the Supplemental Decision and Order dated

October 24, 1974.

s/ Samuel J. Smith
SAMUEL J. SMITH
Administrative Law Judge

Dated: August 8, 1975
Washington, D.C.

CERTIFICATE OF FILING AND SERVICE

I certify that on August 20, 1975 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Sixth Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mr. John L. Nulty, Post Office Box 805, Escatawpa, Mississippi 39522, Claimant

The Fidelity and Casualty Company of New York, c/o United States P & I Agency, Post Office Box 19496, New Orleans, Louisiana 70179, Insurance Carrier or Employer (if self-insured)

Mr. Charles E. Lugenbuhl, Attorney at Law,Lemle, Kelleher, Kohlmeyer and Matthews, 18th Floor, First National Bank of Commerce Building, New Orleans, Louisiana 70112

Mr. Stephen B. Clarkson, Attorney at Law, Sullivan, Beauregard & Clarkson, 804 Ring Building, 1200 Eighteenth Street, N.W., Washington, D. C. 20036

A copy was also mailed by regular mail to the following:

Judge S.J. Smith, Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20210

Office of the Solicitor, U.S. Dept. of Labor, Division of Employee Benefits, Rm. 4221, Main Labor Bldg. Wash. D.C. 20210

Director, Office of Workmen's Compensation Programs, (LS/HW) U.S. Department of Labor, Washington, D.C. 20211

s/W.C. Kee, Jr.
Deputy Commissioner
Sixth Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workmen's Compensation Programs